

NO. 49050-1

---

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

---

JOHN WORTHINGTON,

Appellant,

v.

WASHINGTON STATE LIQUOR AND CANNABIS BOARD, CHRIS  
MARR, RUTHANN KUROSE, SHARON FOSTER, RICK GARZA,  
STATE OF WASHINGTON,

Cross-Appellants and Respondents.

---

**RESPONSE BRIEF AND  
CROSS APPELLANT'S OPENING BRIEF**

---

ROBERT W. FERGUSON  
Attorney General

R. JULY SIMPSON  
WSBA # 45869  
APRIL S. BENSON  
WSBA # 40766  
Assistant Attorneys General  
Attorneys for Washington State  
Liquor and Cannabis Board  
1125 Washington Street SE  
PO Box 40110  
Olympia, WA 98504  
Phone: (360) 534-4850

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENT OF ERROR.....	2
	1. The superior court erred in remanding back to the Board the denial of the petition to repeal rules on the basis that the Board’s explanation did not specifically address the petitioner’s concerns rather than ruling on the merits of the denial when the denial was well reasoned in light of the facts and circumstances. CP 784-88. ....	2
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	2
	1. Whether the superior court erred in remanding to the Board for a more thorough explanation when an explanation need only facilitate judicial review of whether the denial itself was arbitrary and capricious in light of the facts and circumstances?.....	2
	2. If the superior court erred, should the superior court have affirmed the Board’s denial of a petition to repeal all the I-502 rules when the petition was supported by an inapplicable doctrine and legal conclusions that, even if true, would not invalidate the rules?.....	2
IV.	COUNTERSTATEMENT OF THE ISSUES .....	3
	1. Whether the superior court correctly treated Worthington’s petition for judicial review as seeking review of “other agency action” under the APA, when Worthington filed a petition for judicial review of the Board’s decision denying the rulemaking petition and not a petition seeking review of the rules under RCW 34.05.570(2)? .....	3
	2. Whether Worthington waived any objection to the contents of the administrative record when he did not	

	raise the issue when the record was filed, filed a motion to supplement the record but then struck it, and then only complained about the record in his reply brief?.....	3
3.	Whether the superior court properly declined to make a ruling on issues related to how agencies maintain their rulemaking files when the rulemaking file was not before the court as part of the record and was not relevant to the decision on whether the Board’s agency action was proper? .....	3
4.	Whether the superior court properly denied relief under the Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW, when the Administrative Procedure Act (APA), chapter 34.05 RCW, is the exclusive means of judicial review of agency action? .....	4
V.	STATEMENT OF THE CASE .....	4
VI.	STANDARD OF REVIEW.....	11
VII.	ARGUMENT IN RESPONSE .....	13
A.	The Superior Court Properly Treated Worthington’s APA Appeal as an Appeal of “Other Agency Action” Under RCW 34.05.570(4) and Applied the Arbitrary and Capricious Standard to the Board’s Decision to Not Repeal All the Rules .....	13
1.	The denial of a petition to adopt, amend, or repeal rules under RCW 34.05.330 is appealed as other agency action .....	14
2.	The superior court properly treated Worthington’s petition as an appeal of “other agency action” .....	15
3.	The superior court properly declined to rule on the required contents of the rulemaking file.....	18

B.	Even If Worthington Had Filed an Original Declaratory Challenge to the Rules Under RCW 34.05.570(2), Rather Than Appealing Agency Action, His Bare Allegations Without Evidentiary Support Would Not Be Grounds to Invalidate the Rules Under the APA.....	22
C.	The Superior Court Correctly Ruled That Worthington Cannot Seek Relief Under the UDJA for Alleged Rulemaking Violations .....	25
D.	Worthington Cannot Seek Relief in this APA Action Against Parties Not Involved In Rulemaking .....	26
VIII.	OPENING BRIEF OF CROSS APPELLANTS .....	27
A.	The Board’s Denial of Worthington’s Petition to Adopt, Amend, or Repeal Rules Was Neither Arbitrary Nor Capricious Because Worthington Challenged a Process, Not a Particular Rule.....	28
B.	The Board’s Denial was Not Arbitrary or Capricious Because Worthington Did Not Meet His Burden To Establish That Proper Rulemaking Processes Had Not Been Followed .....	30
C.	The Board’s Explanation For Denying the Petition Was Adequate .....	35
D.	Worthington Was Not Substantially Prejudiced by the Denial of his Rulemaking Petition.....	36
IX.	CONCLUSION .....	38

## TABLE OF AUTHORITIES

### Cases

<i>Anderson, Leech &amp; Morse, Inc. v. Washington State Liquor Control Board,</i> 89 Wn.2d 688, 693 (1978) .....	20
<i>Budget Rent A Car Corp. v. Dep't of Licensing,</i> 144 Wn.2d 889, 31 P.3d 1174 (2001) .....	14
<i>Buell v. City of Bremerton,</i> 80 Wn.2d 518, 495 P.2d 1358 (1972) .....	31
<i>Citizens for a Safe Neighborhood v. City of Seattle,</i> 67 Wn. App. 436, 836 P.2d 235 (1992) .....	31
<i>City of Seattle v. Public Emp't Relations Comm'n,</i> 116 Wn.2d 923, 809 P.2d 1377 (1991) .....	21
<i>Cowiche Canyon Conservancy v. Bosley,</i> 118 Wn.2d 801, 828 P.2d 549 (1992) .....	17, 23
<i>Harris v. Hornbaker,</i> 98 Wn.2d 650, 658 P.2d 1219 (1983) .....	33
<i>Hi-Starr, Inc. v. Liquor Control Bd.,</i> 106 Wn.2d 455, 722 P.2d 808 (1986) .....	23
<i>King County v. Wash. State Boundary Review Bd.,</i> 122 Wn.2d 648, 860 P.2d 1024 (1993) .....	18, 24
<i>Neah Bay Chamber of Commerce v. Dep't of Fisheries,</i> 119 Wn.2d 464, 832 P.2d 1310 (1992) .....	21
<i>Nw. Ecosystem All. v. Wn. Forest Practices Bd.,</i> 149 Wn.2d 67, 66 P.3d 614 (2003) .....	25, 26, 29
<i>Rios v. Washington Dep't of Labor and Industries,</i> 145 Wn.2d 483, 39 P.3d 961 (2002) .....	29

<i>Squaxin Island Tribe v. Wash. State Dep't of Ecology</i> , 177 Wn. App. 734, 312 P.3d 766 (2013).....	3
<i>Squaxin Island Tribe v. Washington State Dep't of Ecology</i> , 177 Wn. App. 734, 312 P.3d 766 (2013).....	passim
<i>Tapper v. Emp't Sec. Dep't</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	2
<i>Wash. Indep. Tel. Ass'n v. Wash. Utils. &amp; Transp. Comm'n</i> , 149 Wn.2d 17, 24, 65 P.3d 319 (2003).....	12, 22
<i>West v. Thurston County</i> , 168 Wn. App. 162, 275 P.3d 1200 (2012).....	34
<i>Williams v. Tilaye</i> , 174 Wn.2d 57, 272 P.3d 235 (2012).....	13

#### **Statutes**

RCW 7.24 .....	4, 13, 25
RCW 7.24.146 .....	25
RCW 34.05 .....	2, 4
RCW 34.05.010(3).....	26
RCW 34.05.010(16).....	14
RCW 34.05.310 .....	34
RCW 34.05.310 through 34.05.395 .....	24
RCW 34.05.310(1)(a)(iii) .....	24
RCW 34.05.312 .....	25
RCW 34.05.315 .....	32
RCW 34.05.325 .....	16, 32, 33

RCW 34.05.330 .....	13, 27, 28, 29
RCW 34.05.330(1).....	14, 28, 35
RCW 34.05.330(1)(a) .....	15
RCW 34.05.330(2).....	15
RCW 34.05.330(3).....	15
RCW 34.05.370 .....	16, 21, 32
RCW 34.05.370(1).....	21
RCW 34.05.370(2)-(3).....	21
RCW 34.05.375 .....	16, 20
RCW 34.05.510 .....	11, 25
RCW 34.05.554 .....	18, 24
RCW 34.05.558 .....	12, 24
RCW 34.05.566(1).....	19
RCW 34.05.570(1).....	11
RCW 34.05.570(1)(a) .....	17, 23
RCW 34.05.570(1)(b) .....	24, 37
RCW 34.05.570(1)(d) .....	12, 36
RCW 34.05.570(2).....	passim
RCW 34.05.570(3)(i) .....	30
RCW 34.05.570(4).....	12, 14, 15, 16
RCW 34.05.570(4)(c) .....	12, 15

RCW 34.05.574 .....	27
RCW 34.05.655 .....	15
RCW 69.50 .....	4
RCW 69.50.325–369 .....	4

### **Regulations**

WAC 314-55.....	21, 37
WAC 314-55-005.....	4
Wash. St. Reg. 12-24-090.....	4
Wash. St. Reg. 13-21-104.....	4
Wash. St. Reg. 14-02-022.....	4, 37
Wash. St. Reg. 14-16-066.....	4, 37
Wash. St. Reg. 15-02-065.....	4, 37
Wash. St. Reg. 16-01-111.....	4, 37

## **I. INTRODUCTION**

Over the course of three years, the Washington State Liquor and Cannabis Board worked to adopt rules to implement the first system in Washington to regulate the production, processing, and retail sale of recreational marijuana. After the rules, subsequent revisions, and some additions were adopted, John Worthington petitioned the Board to repeal all these rules because he believes that a “shadow government” conspired with the Board to craft the rules in a way that would prevent access to marijuana. The Board declined to undo the years of its rulemaking efforts based on Worthington’s wild allegations and denied the petition.

When the Board denied Worthington’s extraordinary request, he appealed to the superior court under the Administrative Procedure Act (APA). He also sought injunctive relief under the Uniform Declaratory Judgment Act (UDJA) to prevent the Board, Attorney General Bob Ferguson, and Governor Jay Inslee from participating in or influencing future rulemaking.

The superior court properly treated Worthington’s petition as an appeal of “other agency action” under the APA and applied the arbitrary and capricious standard to the Board’s decision. However, the court erred when it applied the standard to the Board’s explanation for denying the petition rather than to the merits of the denial itself. The Board asks the

Court to vacate the superior court's remand order, affirm the Board's denial of Worthington's petition to repeal, and otherwise affirm the superior court's order.

## **II. ASSIGNMENT OF ERROR**

The Board assigns no error to the final decision of the Board. However, because the Thurston County Superior Court erred in remanding the Board's decision, and the Board is now a cross-appellant, the Board assigns error to the following aspect of the superior court's order:<sup>1</sup>

1. The superior court erred in remanding back to the Board the denial of the petition to repeal rules on the basis that the Board's explanation did not specifically address the petitioner's concerns rather than ruling on the merits of the denial when the denial was well reasoned in light of the facts and circumstances. CP 784-88.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the superior court erred in remanding to the Board for a more thorough explanation when an explanation need only facilitate judicial review of whether the denial itself was arbitrary and capricious in light of the facts and circumstances?
2. If the superior court erred, should the superior court have affirmed the Board's denial of a petition to repeal all the I-502 rules when the petition was supported by an inapplicable doctrine and legal conclusions that, even if true, would not invalidate the rules?

---

<sup>1</sup> This is a judicial review of a final agency decision under the Washington Administrative Procedure Act, chapter 34.05 RCW. The Court of Appeals sits in the same position as the superior court and reviews the Board's decision. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

#### IV. COUNTERSTATEMENT OF THE ISSUES

This is a judicial review of agency action and review of a superior court's dismissal of claims under the UDJA. Although the dismissal of the UDJA claims are reviewed de novo, when reviewing the judicial review of agency action, this Court sits in the same position as the superior court and directly reviews the challenged agency action. *Squaxin Island Tribe v. Wash. State Dep't of Ecology*, 177 Wn. App. 734, 739, 312 P.3d 766 (2013). Accordingly, the Respondent, Worthington, should assign error to the Board's actions being challenged rather than the actions of the superior court. The Board submits the following counterstatement of the issues in response to Worthington's Opening Brief:

1. Whether the superior court correctly treated Worthington's petition for judicial review as seeking review of "other agency action" under the APA, when Worthington filed a petition for judicial review of the Board's decision denying the rulemaking petition and not a petition seeking review of the rules under RCW 34.05.570(2)?
2. Whether Worthington waived any objection to the contents of the administrative record when he did not raise the issue when the record was filed, filed a motion to supplement the record but then struck it, and then only complained about the record in his reply brief?
3. Whether the superior court properly declined to make a ruling on issues related to how agencies maintain their rulemaking files when the rulemaking file was not before the court as part of the record and was not relevant to the decision on whether the Board's agency action was proper?

4. Whether the superior court properly denied relief under the Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW, when the Administrative Procedure Act (APA), chapter 34.05 RCW, is the exclusive means of judicial review of agency action?

## V. STATEMENT OF THE CASE

Washington voters approved Initiative Measure 502 in November 2012. Laws of 2013, ch. 3. I-502 was codified as part of chapter 69.50 RCW. *Id.*; RCW 69.50.325–369. I-502 directed the Board to establish a system for issuing licenses to producers, processors, and retailers of marijuana for recreational use. Laws of 2013, ch. 3; RCW 69.50.325–369. In December 2012, the Board filed an initial preproposal statement of inquiry to begin developing rules implementing I-502. Wash. St. Reg. 12-24-090 (filed Dec. 5, 2012). The Board adopted the resulting rules as chapter 314-55 WAC in November 2013. WAC 314-55-005; Wash. St. Reg. 13-21-104 (filed Oct. 21, 2013; effective Nov. 21, 2013). Since that initial I-502 rulemaking process, the Board has adopted several amendments and revisions to chapter 314-55 WAC. *See* Wash. St. Reg. 14-02-022, 14-16-066, 15-02-065, 16-01-111 (semi-annual rule-making agendas, filed: Dec. 20, 2013; July 30, 2014; Jan. 6, 2015; Dec. 17, 2015).

In February 2015, Worthington filed a Complaint in Thurston County Superior Court challenging the rulemaking process under the APA, UDJA, OPMA, and State Constitution alleging that 17 secret

meetings constituted an “illicit partnership” and, thus requesting that the rulemaking be redone by an agency other than the Board.<sup>2</sup>

Nonetheless, while his February 2015 case was pending, in April 2015, Worthington filed a petition with the Board under RCW 34.05.330, asking it to repeal “all marijuana rules and marijuana land use decisions by the WSLCB” on substantially the same bases as in his then-pending lawsuit. Administrative Record (AR) 3, 5–12. Where the petition form requests the reason for the petition, Worthington checked “other” and wrote, “Whether the rule was adopted according to all applicable provisions of law.” AR 6. Worthington attached a letter to his petition explaining that he believed the rules should be repealed, “because in the course of making rules for I-502, the [Board] . . . [met] with cities, counties, law enforcement, and treatment professionals in private.” AR 8. He further alleged that the Board met secretly 17 times with these various stakeholders, who were opposed to decriminalizing marijuana, and this “external team” partnered with the Board to undermine the Initiative’s purpose. AR 8-10. He did not specifically articulate how any particular

---

<sup>2</sup> *John Worthington v. Washington State Liquor Control Board, Chris Marr, Ruthann Kurose, Sharon Foster, Rick Garza, and Washington State*, Thurston County Superior Court No. 15-2-00069-9. See AR 3, 238; CP 197-210, 408-51 (records from this parallel litigation that Worthington submitted to the superior court as attachments to declarations).

rules<sup>3</sup>—or how the rules collectively—undermined the Initiative’s purpose. However, he argued the 17 meetings with the “external team” violated the Appearance of Fairness Doctrine, which required repeal of all the rules so that they could be “redone so the public confidence can be restored.” AR 8-10.

Worthington subsequently sent an email to the Board’s rules coordinator, Karen McCall, requesting that she add the email to his pending petition. AR 58. That email consisted of quotations from the APA Rule-Making Procedures section, followed by various iterations of the legal conclusion that by holding “17 secret meetings,” and altering the rulemaking file, the Board violated the required rulemaking procedures. AR 58-64. He also copied the entire list of rules contained in chapter 314-55 WAC into the email, identifying all the rules as invalid because, he alleged, the Board violated all of the rulemaking statutes under the APA. AR 58-64 (“the rules . . . are invalid because the WSLCB was not in substantial compliance with RCW 34.05.310 through RCW 34.05.395. Please repeal all of your I-502 rules . . . .” AR 63).

---

<sup>3</sup> On the third page of his Petition, AR 7, Worthington listed 11 rules he wished repealed that he referred to as the “Preliminary List of WAC’s to be repealed.” *Id.* Worthington’s further comments on this list, including the information listed as “A-C,” and the reference to “All of these WAC’s, and more,” illustrate that he intended for his petition to encompass more than the 11 rules he listed.

Worthington later sent additional emails to McCall requesting that she add more documents to his petition. AR 65, 110, 118, 173, 181. These additions included various “exhibits,” including emails documenting public records requests that Worthington had made, documents that Worthington believed supported his claims of “secret meetings,” and a copy of the final order and oral ruling in *Arthur West v. Washington State Liquor Control Board, Sharon Foster, Chris Marr, Ruthanne Kurose*, Thurston County Superior Court No. 13-2-01603-3. AR 65-234. In that case, Arthur West, who is not a party to this case, challenged the validity of the rules under the Open Public Meetings Act (OPMA), alleging that because the same 17 meetings that Worthington complains of did not comply with OPMA, the rules should be invalidated. AR 93-95 (Order on Renewed Summary Judgment Motion on OPMA Claims), AR 96-105. The Superior Court in *West* ruled that while the meetings violated OPMA’s notice requirements, the I-502 rules were not void because no “action” was taken at those meetings. AR 93-95, 99-100.

All of this documentation was presented to the Board members for consideration of Worthington’s petition to repeal the rules. AR 57. In June 2015, the Board denied Worthington’s petition because it did “not object to a particular rule, but only to the Board’s rule adoption process and alleged effect of the rules.” AR 3, 49-50, 56-57. The Board stated that

“Staff believed that the proper rulemaking processes had been followed and that the rules properly implemented the initiative.” AR 3, 49-50 56-57. The Board also noted that Worthington was already pursuing a rules challenge in the superior court and that several revisions and new rules had been adopted since the initial rulemaking process was completed. AR 3, 49-50, 56-57.

Worthington appealed the Board’s decision to deny his rulemaking petition to superior court. *See* CP 649-674 (Amended Petition for Review). The Petition for Judicial Review identified the agency action at issue as the Board’s “decision denying Worthington’s Petition to repeal the rules.” CP 654-55. The request for relief asked that the superior court vacate the Board’s decision to deny the rulemaking petition. CP 671. Worthington also sought relief under the Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW, alleging that the Board’s “allegiance with the ‘partnership’” violated two provisions of the Washington State Constitution, and asking that the Board be enjoined “from participating in current and future I-502 rulemaking Processes.” CP 666-67, 671-72.

Based on the petition for judicial review, the Board filed the certified record for judicial review in October 2015. The certified record consisted of the documents the Board reviewed in considering Worthington’s petition: a copy of the petition to repeal, the documents

Worthington filed in support of his petition, and the correspondence between Worthington and Board staff. AR 1-238. It did not include the I-502 rulemaking file. Worthington did not object at that time to the contents of the record filed or file a motion to supplement the record with the rulemaking file.

Worthington filed his Opening Brief in March 2016. He argued that the Board's denial of his petition to repeal the rules was arbitrary and capricious and asked the court to vacate the Board's decision. CP 12, 35. The Board filed its Response Brief the following month. CP 742-758. After the Board filed its Response Brief, Worthington filed a motion requesting that he be allowed to file electronically 8,000 pages as exhibits. CP 711-712 (Motion to Allow Exhibits in Electronic CD Format). The Board objected to this request for several reasons: (1) the late nature of the request, (2) because Worthington had not demonstrated additional evidence was appropriate under RCW 34.05.562(1), (3) because Worthington had not requested permission from the Court to supplement the agency record as required under RCW 34.05.566(6) (requiring additions to the record to be made only as ordered by the court), and (4) because Worthington had not served a copy of the proposed additional evidence on the Board for its review. CP 765-768 (Response to Motion to Allow Exhibits in Electronic CD Format). Worthington then struck and

withdrew this motion. CP 775-776 (Stipulation and Agreed Order for Protective Order).

Worthington later filed his Reply Brief in which, for the first time, he argued that the Board improperly failed to include the rulemaking file as part of the certified record, CP 527, and that he was bringing a rules challenge seeking invalidation of the rules by the superior court rather than appealing the Board's denial of his rulemaking petition to repeal the rules. CP 528, 537.

At the hearing, Worthington argued that the Board should have filed the rulemaking file as the agency record. VRP at 11:16-19 (May 6, 2016). The superior court declined to review documents not made part of the agency record and reminded Worthington that the APA and Thurston County Superior Court have procedures to supplement agency records that Worthington was aware of, but did not follow. VRP at 9:16-10:1-7 (May 6, 2016); VRP at 13:4-21 (May 20, 2016). The superior court also reminded Worthington that he had previously moved to supplement the record with several thousand pages but subsequently struck that motion. VRP at 10:4-7 (May 6, 2016).

The superior court ultimately (1) found that the Board's denial was "other agency action" appealable under the APA, (2) denied relief under the UDJA because that act does not afford relief of agency action, (3)

denied relief against non-agency parties, (4) found Worthington did not establish any constitutional violations in the rulemaking process, (5) found the Appearance of Fairness Doctrine is inapplicable in the rulemaking context, but (6) found that the Board's statement in denying Worthington's petition that he had not objected to any particular rule was erroneous and, therefore, arbitrary and capricious. CP 779-80; VRP at 34-41 (May 6, 2016). Accordingly, the court remanded the petition to the Board to issue a new decision that would explain and address Worthington's "specific objections and concerns in a more thoughtful manner." CP 779-780.

Worthington filed a Notice of Appeal and Notice of Discretionary Review. CP 158-164. The Board also filed a Notice of Discretionary Review seeking its own review of the remand order. AP 165-167. After a hearing before the Commissioner, the Court converted both parties' Notices of Discretionary Review to appeals as of right.

## **VI. STANDARD OF REVIEW**

The Administrative Procedure Act (APA), chapter 34.05 RCW, establishes the exclusive means of judicial review of agency action. RCW 34.05.510. The burden of demonstrating the invalidity of agency action is on the party asserting invalidity. RCW 34.05.570(1). This Court sits in the same position as the superior court and applies the standards of the APA

directly to the agency's administrative record. *Squaxin Island Tribe v. Washington State Dep't of Ecology*, 177 Wn. App. 734, 740, 312 P.3d 766 (2013), citing *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 149 Wn.2d 17, 24, 65 P.3d 319 (2003). Additionally, "the court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of." RCW 34.05.570(1)(d).

A decision denying a rulemaking petition is "other agency action" subject to judicial review under RCW 34.05.570(4). *Squaxin Island Tribe*, 177 Wn. App. at 770. The court may grant relief only if it determines that the agency action is unconstitutional, outside the agency's authority, arbitrary or capricious, or taken by unauthorized persons. *Id.* (citing RCW 34.05.570(4)(c)).

Judicial review is limited to the agency record. RCW 34.05.558. During briefing in the superior court, and in his briefing to this Court, Worthington has included documents that were not part of the certified agency record. This Court should not consider any documents, whether in the clerk's papers or attached to Worthington's brief, that are not contained in the agency record.

Regarding the superior court's dismissal of Worthington's UDJA claims, the superior court dismissed those claims because of the statutory

limitations of chapter 7.24 RCW and, thus, this Court will review that dismissal de novo. *See Williams v. Tilaye*, 174 Wn.2d 57, 61, 272 P.3d 235 (2012).

## **VII. ARGUMENT IN RESPONSE**

### **A. The Superior Court Properly Treated Worthington's APA Appeal as an Appeal of "Other Agency Action" Under RCW 34.05.570(4) and Applied the Arbitrary and Capricious Standard to the Board's Decision to Not Repeal All the Rules**

Under RCW 34.05.330, Worthington petitioned the Board to repeal all of the rules because, he alleged, the Board conspired in "secret" meetings with stakeholders whose interests were not aligned with his own, which tainted the rulemaking process. CP 649-690 (Petitioner's First Amended Petition), CP 7-37 (Petitioner's Opening Brief). He did not identify how any particular rules, or how all of the rules generally, failed to properly implement the initiative.

When the Board denied the petition, Worthington petitioned the superior court for judicial review, stating that he was challenging the Board's denial of his petition to repeal rules under RCW 34.05.330. CP 778 (Findings of Fact, Conclusions of Law and Order); CP 649 (Amended Petition for Review at ¶ 1.1). He also requested relief under the Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW, and made claims that the rulemaking process was unconstitutional, which he

had not argued before the Board. CP 649-50, 669-70. On judicial review of the Board's denial of his rulemaking petition, the superior court properly treated the petition as an appeal of "other agency action" under RCW 34.05.570(4) and not a petition for declaratory judgment under RCW 34.05.570(2). This Court should affirm that aspect of the superior court's decision, and thus affirm the Board's denial of Worthington's petition.

**1. The denial of a petition to adopt, amend, or repeal rules under RCW 34.05.330 is appealed as other agency action**

Worthington filed a petition with the Board requesting all marijuana rules be repealed. CP 778; AR 2; CP 649 (Amended Petition for Review at ¶ 1.1). The APA allows any person to petition an agency to adopt, amend, or repeal a rule. RCW 34.05.330(1). The agency considering a petition to adopt, amend, or repeal must either deny the petition or initiate rule-making proceedings in response to the petition. RCW 34.05.330(1); *see also* RCW 34.05.010(16).<sup>4</sup> A denial of the petition must be in writing and include the "reasons for the denial,

---

<sup>4</sup> The APA defines "rule" to include "the amendment or repeal of a prior rule." RCW 34.05.010(16). Thus, even if an agency were inclined to grant a petition to repeal a rule, the agency would have to go through a rulemaking process to carry out the repeal. *See Budget Rent A Car Corp. v. Dep't of Licensing*, 144 Wn.2d 889, 895-96, 31 P.3d 1174 (2001) (agency action that falls within the APA definition of a rule must be made after engaging in rule making procedures, or will be invalidated).

specifically addressing the concerns raised by the petitioner.” RCW 34.05.330(1)(a).

A denial can be reviewed in three ways. First, if the denied petition alleges that the rule was not adopted in accordance with all applicable provisions of law, the petitioner may petition for review by the legislature’s joint administrative rules review committee under RCW 34.05.655. RCW 34.05.330(2). Second, the petitioner may appeal the denial to the governor. RCW 34.05.330(3). Third, the petitioner may seek judicial review by a superior court as review of “other agency action.” RCW 34.05.570(4); *Squaxin Island Tribe*, 177 Wn. App. at 740.

Worthington pursued the third avenue of seeking review—review by the superior court. On judicial review, the superior court applies the arbitrary and capricious standard to the agency’s decision to deny the petition based on the circumstances, basis for the request, and information put before the agency in the rulemaking petition, recognizing an agency has wide discretion in deciding to forego rulemaking. RCW 34.05.570(4)(c); *Squaxin Island Tribe*, 177 Wn. App. at 740-42.

**2. The superior court properly treated Worthington’s petition as an appeal of “other agency action”**

The superior court properly treated Worthington’s Petition for Judicial Review as an appeal of “other agency action” under RCW

34.05.570(4) rather than as an original action under the APA challenging the rules under RCW 34.05.570(2). Worthington petitioned the Board to repeal its rules adopted under I-502 based on unfounded allegations and legal conclusions about the rulemaking process. AR 5-46, 58-236. The Board denied the petition. AR 1-4, 49-50, 56-57. Worthington appealed that denial. CP 649-674.

In superior court, Worthington did not file a petition under the APA for declaratory judgment for a review of rules under RCW 34.05.570(2)—he filed an appeal of the Board’s denial of his petition to repeal rules. *See* CP 654-55.<sup>5</sup> Thus the superior court correctly treated this case as an appeal of other agency action under RCW 34.05.570(4). *Squaxin Island Tribe*, 177 Wn. App. at 740.

---

<sup>5</sup> *See also* CP 7-37 (Petitioner’s Opening Brief); CP 12 (“Worthington hereby submits his opening brief in his appeal of the [Board’s] denial of his Petition for Rulemaking”); CP 13 (discussing factual and procedural history of petition to repeal rules that was denied by the Board and arguing the denial was arbitrary and capricious); CP 20-21 and 23 (standing based on Board’s denial of his petition to repeal rules); CP 24 (arguing decision to deny petition was arbitrary and capricious); CP 24-25 (arguing that it was arbitrary and capricious of the Board to deny his rulemaking petition when he alleged that the rules were invalid pursuant to RCW 34.05.375, failure to substantially comply with rulemaking requirements, and stating that he would argue and add information to prove this); CP 29 (arguing the Board was arbitrary and capricious in denying his petition and determining they had complied with RCW 34.05.325); CP 32 (arguing the Board was arbitrary and capricious in denying his petition and determining they had complied with RCW 34.05.370); CP 33 (arguing the Board erroneously interpreted the law when it denied Worthington’s petition to repeal the rules); CP 34 (arguing the Board’s denial of Worthington’s petition was arbitrary and capricious and not supported by substantial evidence; arguing the Board did not review the rulemaking file to make this decision); CP 35 (requesting relief from the court in the form of vacating the Board’s decision to deny the rulemaking petition and remanding to the Board). Hidden within these arguments are oblique complaints that the Board never provided the rulemaking file as part of the Administrative Record (CP 18 and 31).

Even if Worthington's Petition for Judicial Review could be construed as an original rules challenge in superior court under RCW 34.05.570(2), Worthington waived this argument when he failed to take action to supplement the agency record with the rulemaking file, or even to argue a challenge to the rules in his Opening Brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguing matters plainly at issue for the first time in a reply brief is too late to merit consideration). Thus these issues were not properly placed before the superior court. *See* RCW 34.05.570(1)(a) ("The burden of demonstrating the invalidity of agency action is on the party asserting invalidity.").

Here, the Board prepared and filed the agency record for the superior court based on Worthington's Petition for Judicial Review. CP 655-56 (Amended Petition for Review at ¶ 3.1); CP 708-710 (Certificate of Agency Record and Index of Agency Record). Worthington had several months between when the record was filed and when his opening brief was due to contest the record. *See* CP 708-710 (Certified Record, filed Oct. 28, 2015); CP 7-37 (Worthington's opening brief, filed Mar. 21, 2016). Worthington never moved to supplement the record to include the rulemaking file. Accordingly, just as the superior court did, this Court

should review the agency action at issue: the denial of the petition to repeal rules filed with the Board.

**3. The superior court properly declined to rule on the required contents of the rulemaking file**

As discussed, Worthington appealed the Board's denial of his petition to repeal the rules, which claimed the rules should be repealed because of the Board's work with private "partners" to undermine the Initiative. Although at one point in correspondence with the Board, Worthington accused the Board of "altering the rulemaking file," AR 60, his petition was based primarily on his allegations of what transpired at "17 secret meetings." AR 8-10, 60-62. Issues not raised before the agency generally may not be raised on appeal. RCW 34.05.554; *see also King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 670, 860 P.2d 1024 (1993) ("In order for an issue to be properly raised before an administrative agency, there must be more than simply a hint or a slight reference to the issue in the record."). The superior court properly limited the scope of its ruling to the issues Worthington actually raised and briefed in his petition to repeal.

The Board prepared and filed as the agency record for the superior court the documents the Board considered when making its decision on Worthington's petition to repeal all the marijuana rules. *See* RCW

34.05.566(1). It did not include the entire I-502 rulemaking file with the record because the Board did not review it in considering Worthington's petition. *See* AR 56-57. Worthington had several months between when the record was filed and when his opening brief was due to contest the record. *See* CP 708-710 (Certified Record, filed Oct. 28, 2015); CP 7-37 (Worthington's opening brief, filed Mar. 21, 2016). Worthington did not take action to object to the contents of the record nor did he move to supplement it.

At one point, Worthington did file a motion to file additional documents as exhibits. CP 711-712. However, he subsequently withdrew that motion. CP 776. In fact, Worthington's withdrawal of his motion was a factor the superior court noted when limiting judicial review to the issue of whether the Board properly denied Worthington's petition to repeal. VRP at 9:16-10:1-7 (May 6, 2016); VRP at 13:4-21 (May 20, 2016).

The superior court properly declined to make substantive decisions on whether the Board substantially complied with the rulemaking file requirements of the APA. *See* CP 777-781 (Findings of Fact, Conclusions of Law and Order). Even if the required contents of an agency's rulemaking file were at issue, Worthington does not cite any authority for the proposition that if a rulemaking file is not perfectly maintained, all of the rules that are the subject of that file must be

repealed. Thus, whether the rulemaking file was properly compiled is not at issue in this case, which is an appeal of the Board's denial of a petition to repeal rules.<sup>6</sup> Moreover, since the rulemaking file is not in the record for judicial review, the superior court properly declined to address arguments about its contents.

In any event, Worthington does not dispute that the Board kept a rulemaking file; rather, Worthington's complaint is with how the Board compiled and maintained its rulemaking file. Appellant's Br. at 31, 48. Specifically, Worthington believes that if a document is mistakenly placed in a rulemaking file, the agency cannot *ever* correct its mistake and remove the document. But even if removing documents mistakenly placed in a file box was a technical violation of the rulemaking file provisions (which the Board disputes), the Board would still be in substantial compliance with the APA.

Rules must be adopted in "substantial compliance" with the rulemaking file provisions of the APA—strict compliance is not necessary. RCW 34.05.375; *Anderson, Leech & Morse, Inc. v. Washington State Liquor Control Board*, 89 Wn.2d 688, 693 (1978). Substantial compliance seeks compliance regarding the reasonable objective of a

---

<sup>6</sup> The superior court's decision in a separate Public Records Act action Worthington filed against the Board, relating to the proper contents of the rulemaking file, is also pending before this Court. *John Worthington v. Washington State Liquor & Cannabis Board and Washington State*, 48980-5-II.

statute and includes compliance that is procedurally faulty. *City of Seattle v. Public Emp't Relations Comm'n*, 116 Wn.2d 923, 928, 809 P.2d 1377 (1991). By contrast, an utter failure to comply would not be substantial compliance. *Neah Bay Chamber of Commerce v. Dep't of Fisheries*, 119 Wn.2d 464, 476, 832 P.2d 1310 (1992) (superseded by statute) (noting that a lack of a rulemaking file may constitute sufficient reason to invalidate a regulation). An agency must keep an official rulemaking file for each rule that it proposes or adopts. RCW 34.05.370(1). The file must include certain documents specified by statute, though certain internal agency documents are exempt. RCW 34.05.370(2)-(3).

Here, the Board has complied with the reasonable objective of the statute: it has maintained an official rulemaking file that includes the information it considered in adopting the rules as required by a plain reading of RCW 34.05.370. Worthington concedes the Board has a rulemaking file. This is substantial compliance with the rules. Thus as a matter of law, Worthington's allegations—about certain documents being removed from a file the Board does in fact maintain—do not require that all of the rules in chapter 314-55 WAC be invalidated.

The superior court correctly confined the judgment to a determination of whether the Board properly denied the petition to repeal, recognizing that the other issues were not before it. *See* CP 777-779

(Findings of Fact, Conclusions of Law and Order); VRP at 9-11 (May 6, 2016). Because this Court sits in the same position as the superior court and applies the law directly to the agency record, these issues also are not before this Court. *Squaxin Island Tribe*, 177 Wn.2d at 740 (citing *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 149 Wn.2d 17, 24, 65 P.3d 319 (2003)).

**B. Even If Worthington Had Filed an Original Declaratory Challenge to the Rules Under RCW 34.05.570(2), Rather Than Appealing Agency Action, His Bare Allegations Without Evidentiary Support Would Not Be Grounds to Invalidate the Rules Under the APA**

Even if Worthington had filed a petition for declaratory judgment or other original review of rules under RCW 34.05.570(2) of the APA in superior court, rather than appealing the Board's denial of his petition to repeal, Worthington's allegations provide no basis to invalidate the rules.

Worthington did not provide any meaningful evidence to support his bare allegations that the Board conspired with "partners" to promulgate rules that would undermine decriminalization efforts. More importantly, he failed to explain how any of the individual rules, or how all of the rules collectively, failed to implement the purpose of the Initiative. Thus, Worthington failed to satisfy his burden to present compelling reasons why the rules conflict with the intent and purpose of the initiative they

implement. RCW 34.05.570(1)(a); *see Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wn.2d 455, 459, 722 P.2d 808 (1986).

Worthington also erroneously argues that the Board should be foreclosed from making any arguments defending against his claims that the I-502 rules violated the APA's rulemaking requirements. Worthington himself concedes that he "clarified" his position throughout the briefing process, Appellant's Br. at 29, and "after reading the Reply brief" the parties and the Superior Court should have known that a rules challenge was being brought. *Id.* at 26. But "clarifying" that he was bringing a different claim in a reply brief did not allow the Board an opportunity to prepare and submit a record or to respond to the late-raised arguments. Nor does it merit consideration by a court. *Cowiche Canyon Conservancy*, 118 Wn.2d at 809 (arguing matters plainly at issue for the first time in a reply brief is too late to merit consideration)

Finally, the sufficiency of the prenotice statement of inquiry for the I-502 rules is not properly before this Court. *See* Appellant's Br. at 51-55. In his petition to repeal, Worthington did not identify that he was specifically challenging the sufficiency of the Board's prenotice statement of inquiry for any of the Board's I-502 rulemaking. *See* AR 5-12, 58-65, 110, 118, 173, 181. At best, he included a citation to the prenotice inquiry statute in a list of statutes he believed the Board violated, but again, his

conclusory and unsupported allegations were that the Board violated *all* of the APA rulemaking statutes so the Board should repeal *all* of its rules adopted under I-502. AR 58, 63 (“the rules developed for I-502 are invalid because the WSLCB was not in substantial compliance with RCW 34.05.310 through 34.05.395. Please repeal all of your I-502 rules . . .”). The Court should not address an issue that was not fully raised before the agency. RCW 34.05.554; *King County*, 122 Wn.2d at 670 (“In order for an issue to be properly raised before an administrative agency, there must be more than simply a hint or a slight reference to the issue in the record.”).<sup>7</sup>

Furthermore, the APA limits review of the validity of the agency action to the situation that existed at the time the agency action was taken. RCW 34.05.570(1)(b). The prenotice statement of inquiry “[i]dentifies other federal and state agencies *that regulate this subject*, and describes the process whereby the agency would coordinate the contemplated rule with these agencies.” RCW 34.05.310(1)(a)(iii) (emphasis added). At the time the Board issued its prenotice inquiry for its first set of I-502 rules in 2012, it was creating rules to establish the first system in Washington for

---

<sup>7</sup> Moreover, no prenotice statement of inquiry is in the agency record for judicial review. While Worthington attached what appear to be altered copies of various preproposal statements of inquiry as exhibits to a declaration he filed in support of his opening brief with the superior court, CP 53-58, the superior court appropriately declined to consider evidence outside the agency record. *See* VRP at 9:16-10:1-7 (May 6, 2016); VRP at 13:4-21 (May 20, 2016); RCW 34.05.558 (judicial review confined to the agency record).

issuing licenses to producers, processors, and retailers of marijuana for recreational use—something no other state or federal agencies were doing at the time. *See* Laws of 2013, ch. 3. Thus, Worthington’s argument that the Board’s prenotice inquiry did not substantially comply with the APA, Appellant’s Br. at 51-53,<sup>8</sup> fails as a matter of law.

**C. The Superior Court Correctly Ruled That Worthington Cannot Seek Relief Under the UDJA for Alleged Rulemaking Violations**

The APA is the exclusive means of judicial review of agency action. RCW 34.05.510. The Uniform Declaratory Judgment Act (UDJA), chapter 7.24 RCW, “does not apply to state agency action reviewable under [the APA].” RCW 7.24.146. The Supreme Court declined to review UDJA claims brought with an APA petition that alleged certain agencies failed to adopt rules to protect natural resources, because the APA is the exclusive means of judicial review of such actions. *Nw. Ecosystem All. v. Wn. Forest Practices Bd.*, 149 Wn.2d 67, 72 and 82, 66 P.3d 614 (2003). For the same reasons cited by the trial court, this Court need not address the UDJA claims. CP 777-681 (Findings of Fact, Conclusions of Law and Order).

---

<sup>8</sup> Worthington also claims this is a violation of RCW 34.05.312. Appellant’s Br. at 54. This appears to be a typographical error because RCW 34.05.312 requires agencies to designate a rules coordinator and Worthington does not argue that the Board failed to do this. *Id.*

Nonetheless, Worthington seeks declaratory and injunctive relief under the UDJA to control agency rulemaking from this Court. Appellant's Opening Br. at 3, 57-64. Worthington argues that he seeks relief under the UDJA for actions "outside the APA," *id.*, but provides no support or argument to support his claim. The APA definition of "agency action" expressly includes "the adoption or application of an agency rule[.]" RCW 34.05.010(3). Worthington seeks to challenge the Board's adoption of rules. No relief is available under the UDJA for complaints about rulemaking procedures. *Nw. Ecosystem All.*, 149 Wn.2d at 72 and 82.

**D. Worthington Cannot Seek Relief in this APA Action Against Parties Not Involved In Rulemaking**

In addition to the Board, Worthington named as respondents Attorney General Bob Ferguson, Governor Jay Inslee, and the State of Washington. Against those respondents, Worthington seeks injunctive and declaratory relief under the UDJA. However, Worthington requests relief he is not entitled to against parties who cannot provide that relief.

Worthington has named as "defendants" the State of Washington, Chris Marr, Ruthann Kurose, Sharon Foster, and Rick Garza. Worthington also seeks injunctive relief against the governor's office and the Washington State Attorney General. These attempts to seek relief against

those who did not take the agency action at issue is improper. The APA limits the type of judicial relief available to relief against the agency, not to any other party. RCW 34.05.574. The superior court properly declined to order any judicial relief against these individuals. CP 777-781 (Findings of Fact, Conclusions of Law and Order). The Court should affirm this portion of the order.

### **VIII. OPENING BRIEF OF CROSS APPELLANTS**

The Board appeals the superior court's order remanding Worthington's petition to repeal the rules to the Board "to issue a new decision that will address each of Worthington's specific objections and concerns brought in his Petition to the Board in a thoughtful manner." CP 780. The superior court was correct in affirming the Board's denial of the petition. The court erred, though, in concluding that the Board's statement that Worthington did not object to any particular rule is arbitrary and capricious and thus the explanation given was inadequate. CP 779.

The Court applies the arbitrary and capricious standard to this record and to the arguments before the Board, *id.*, not to the new arguments Worthington made before the superior court and now before this Court. The Board's explanation for denying the petition to repeal the rules met the requirements of RCW 34.05.330. No further remand for a more elaborate explanation is necessary. Finally, this Court can grant

relief only if a petitioner has been substantially prejudiced. Worthington is unable to establish that he has been substantially prejudiced by the denial of the rulemaking petition. This Court should reverse the portion of the superior court ruling that remands this matter to the Board and affirm the Board's denial of Worthington's petition to repeal all rules.

**A. The Board's Denial of Worthington's Petition to Adopt, Amend, or Repeal Rules Was Neither Arbitrary Nor Capricious Because Worthington Challenged a Process, Not a Particular Rule**

Worthington filed a Petition to Adopt, Amend or Repeal Rules under RCW 34.05.330. AR 5. A petition to adopt, amend or repeal rules is governed by RCW 34.05.330. When receiving a petition to adopt, amend, or repeal a rule, an agency must take action within 60 days. RCW 34.05.330(1). If the agency denies the petition, the denial must be in writing and state the reasons for denial, specifically addressing concerns raised by the petitioner. *Id.* Such petitions are designed to allow individuals to request agencies to (1) adopt needed rules, (2) request agencies to amend unclear rules or rules that need changes or (3) repeal rules that do not do what they are intended to do, are no longer needed, impose unreasonable costs, are beyond the agencies authority, is applied differently to public and private parties, conflict with other laws, duplicates other laws, or that should be repealed for an "other" reason. AR

5-6; *See* RCW 34.05.330. This provision of the APA is invoked infrequently, but appellate courts have considered reviews of petitions under RCW 34.05.330. For example, in *Rios v. Washington Dep't of Labor and Industries*, 145 Wn.2d 483, 486, 39 P.3d 961 (2002), the Supreme Court reviewed whether it was arbitrary or capricious not to adopt a rule requiring the mandatory blood testing of agricultural workers. Similarly, in *Northwest Ecosystem All. v. Washington Forest Practices Bd.*, 149 Wn.2d 67, 69, 66 P.3d 614 (2003), the court reviewed the denial of a rulemaking petition that alleged certain agencies failed to promulgate rules to protect natural resources as statutorily required. In each case, it was the content of the rule, or the lack of a rule the petitioners felt needed to be adopted, that was challenged rather than the process by which the rule was adopted.

Here, Worthington did not object to specific rules but instead contested all the rules and the process by which they were adopted. AR 6 (listing “all marijuana rules” as rule to be repealed), AR 8 (“Please repeal all rules involved with the implementation of I-502”), AR 58-59 (“All of the following rules are invalid” followed by list of the entire chapter 314-55 WAC), AR 63 (“Please repeal all of your I-502 rules.”). Worthington was requesting that the entirety of the I-502 rules be repealed based on arguments that the Board had improperly held “17 secret meetings” and

thus violated the “Appearance of Fairness” doctrine, and also failed to place comments from those 17 secret meetings on the record. In support of his request, Worthington provided only a laundry list of bare citations to APA provisions he accused the Board of violating. He did not argue that the rules failed to substantively implement I-502. Based on Worthington’s lack of meaningful argument or explanation of how any of the rules specifically conflicted with I-502, and a superior court’s ruling that the meetings did not invalidate the rules, the Board properly determined that it had no meaningful basis upon which to conclude it had adopted rules without following proper rulemaking procedures. AR 2-3, 57.

Because a petition to an agency under RCW 34.05.330 is designed to address issues with a specific rule, compared with an original rulemaking challenge under RCW 34.05.570(2) in superior court—which Worthington was already litigating at the time—the Board denied the petition because it objected to the process of the rulemaking rather than a specific rule. AR 3.

**B. The Board’s Denial was Not Arbitrary or Capricious Because Worthington Did Not Meet His Burden To Establish That Proper Rulemaking Processes Had Not Been Followed**

The question of whether or not the Board’s decision is arbitrary or capricious under RCW 34.05.570(3)(i) calls for the court to determine whether the Board's decision is a “willful and unreasonable action, without

consideration and a disregard of facts or circumstances.” *Citizens for a Safe Neighborhood v. City of Seattle*, 67 Wn. App. 436, 439, 836 P.2d 235 (1992) (quoting *Buell v. City of Bremerton*, 80 Wn.2d 518, 495 P.2d 1358 (1972)). Even if the Court believes that the Board’s decision is erroneous, the decision is not arbitrary or capricious if it is reached after due consideration of the facts; or, more simply, where there is room for two opinions, the agency’s decision must prevail. *Id.*

Here, the Board considered the nature and quality of Worthington’s arguments. Worthington asked the Board to repeal several years’ worth of rulemaking efforts to implement an entirely new regulatory field—the legalization of recreational marijuana—based on what essentially amounts to a conspiracy theory. Worthington’s petition alleged that the Board had improperly held “17 secret meetings” in violation of the “Appearance of Fairness” doctrine where the Board conspired with stakeholders opposed to decriminalization to undermine I-502 and then withheld records from the rulemaking file to cover this up. AR 7-12.

Worthington supplemented his petition three times. First, Worthington added the legal conclusion that by having 17 secret meetings, the Board violated provisions of the APA as proven by the language of the

statute itself. AR 110-116.<sup>9</sup> Next, Worthington again supplemented his petition with an email, stating that there is no such thing as “final” rulemaking file but that he had been informed that the rulemaking file had been updated upon completion of rulemaking. AR 118. Attached to this as “proof” was correspondence from the Board related to public records requests Worthington had filed. *Id.* Finally, Worthington requested the addition of an email with no explanation—just an attached email in response to public records requests Worthington had filed with the Board. AR 120-124.

The Board evaluated the materials Worthington provided and denied his petition. AR 3, 49-50, 56-57. First, the Board recognized Worthington did not object to any one particular rule for repeal, but rather objected to all of the rules based on the alleged flaws in the rulemaking process, specifically, the alleged secret partnership with outside groups. Second, the Board disagreed with Worthington’s allegations, as it believed it had followed the required rulemaking processes and properly implemented the initiative. *Id.* Third, the Board recognized that at the time

---

<sup>9</sup> Specifically Worthington argued that by having secret meetings and not placing those comments in the rulemaking file the Board violated RCW 34.05.315, AR 113 (rulemaking docket); that by having secret meetings and altering the rulemaking file they violated RCW 34.05.370 (rulemaking file), AR 113-114; that by having secret meetings the Board violated RCW 34.05.325, AR 115 (concise explanatory statement); and that by violating the foregoing, the Board violated RCW 34.05.370 (substantial compliance with procedures), AR 115-116.

of the petition, it had already made several revisions to the challenged rules and had adopted new rules. *Id.* Fourth, the Board was aware that Worthington was already challenging the I-502 rules based on the same allegations in the petition. *Id.*

Additionally, the Board's decision was correct under the law because Worthington did not meet his burden to establish that proper rulemaking processes had not been followed. Worthington's primary argument to the Board was that he believed the Board's rulemaking process violated the "appearance of fairness" doctrine. AR 8. But that doctrine is inapplicable to rulemaking processes; it applies to adjudicative, rather than legislative, decisions by an agency. *Harris v. Hornbaker*, 98 Wn.2d 650, 658–59, 658 P.2d 1219 (1983).

Beyond the appearance of fairness argument, Worthington made only vague and conclusory statements to support his request for repeal of the I-502 rules. The petition's legal conclusions often consisted of just a single sentence such as: "When the WSLCB held their 17 secret public meetings, the WSLCB violated RCW 34.05.325." AR 113-116. Given that RCW 34.05.325, for example, sets forth multiple requirements for an agency to allow public participation in rulemaking, it was impossible for the Board to understand the precise nature of the error Worthington alleged or to address his petition with more specificity.

Worthington provides no authority for his theory that all “comments” should have been placed “on the record” and the failure to do so violates RCW 34.05.310. AR 8-9, Appellant’s Opening Brief at 46. He appeared to suggest that any kind of communication to an agency in the rulemaking process constitutes a “comment” that the public must be given an opportunity to rebut. AR 8. Thus, because Worthington failed to indicate any rational reason for repealing the rules, the Board properly determined that the rules implemented the goals of the initiative. AR 2-3.

Worthington did not allege how any of the rules specifically conflicted with the Initiative or make more than passing arguments and such bald, unsupported assertions do not merit undoing years of rulemaking. *See West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (“bald assertions lacking cited factual and legal support” without “developed argument” do not merit review by a Court). Thus, given the inapplicability of the appearance of fairness doctrine, the purely conclusory nature of the claims, and because the Board substantially complied with APA rulemaking procedures, as analyzed above, the Board’s denial of the petition was not arbitrary or capricious. Rather, the Board appropriately exercised its wide discretion to decline to repeal all of the rules it adopted after years of work and public input. *Squaxin Island Tribe*, 177 Wn. App. at 771 (“an agency has wide discretion in deciding to

forgo rulemaking”). For these reasons, this Court should affirm the Board’s denial.

**C. The Board’s Explanation For Denying the Petition Was Adequate**

The superior court did not find that the denial of the petition itself was arbitrary or capricious. CP 777-780. Rather, the superior court held that the Board’s *explanation* for denying the petition was arbitrary and capricious because it was “incorrect” that Worthington had not identified specific rules. CP 779. Thus, the superior court remanded for the Board to issue a more thoughtful denial. CP 780.

But it is the Board’s decision itself that is evaluated for arbitrary or capriciousness—not the quality or specific nature of the explanation for the Board’s decision. *Squaxin Island Tribe*, 177 Wn. App. at 741. The requirement that agencies provide the reasons for denial that address a petitioner’s concerns under RCW 34.05.330(1) is to give notice to interested parties and to enable reviewing courts to apply the APA standards of judicial review. *Id.* at 741. The sufficiency of an agency’s explanation of a denial is evaluated “in light of [the explanation’s] purpose to facilitate judicial review of whether the agency’s decision not to engage in rulemaking was arbitrary and capricious.” *Id.* When the true grievance is with the merits of the denial itself, a challenge to the explanation will

not serve as an adequate substitute. *Id.* Here, Worthington’s grievance was that the Board conspired with stakeholders, the Attorney General, and the Governor as part of a shadow government designed to hijack the rulemaking process for an unspecified, nefarious purpose. CP 12 (arguing stakeholders with conflicts of interest were commandeered the rulemaking process as part of a shadow government).

For these reasons, the Board’s explanation was adequate, and there is no reason for a remand to the Board to issue an explanation that more “thoughtfully” addresses the individual concerns addressed in the petition to the Board. This Court should affirm the Board’s denial of Worthington’s rulemaking petition.

**D. Worthington Was Not Substantially Prejudiced by the Denial of his Rulemaking Petition**

A court may grant relief “only if it determines that a person seeking relief has been substantially prejudiced by the action complained of.” RCW 34.05.570(1)(d). Worthington was not substantially prejudiced by the denial of his rulemaking petition first because several revisions and new rules have been adopted since the alleged procedural irregularities and, second, because Worthington was already challenging the rulemaking procedure in superior court at the time of the denial of the rulemaking

petition. RCW 34.05.570(1)(b) (the validity of agency action is determined at the time the action was taken).

Worthington submitted his petition for repeal on grounds that the Board's rulemaking process was flawed. But, since the initial rulemaking process, the Board has reopened the rules to adopt amendments to chapter 314-55 WAC. *See* Wash. St. Reg. 14-02-022, 14-16-066, 15-02-065, 16-01-111 (semi-annual rule-making agendas, filed: Dec. 20, 2013; July 30, 2014; Jan. 6, 2015; Dec. 17, 2015). In these more recent rulemaking processes, Worthington has had opportunities to make comments and rebut any information provided to the Board during the initial process that he disagrees with. This subsequent opportunity to make comments cures any prejudice Worthington believes he suffered. Worthington, therefore, has not been "substantially prejudiced" by the Board's denial.

Furthermore, in denying Worthington's petition, the Board was aware that Worthington's voice and challenges would not go unheard because he was already challenging the rule process in superior court—where he could develop his arguments and air his grievances in the proper forum. Thus, Worthington cannot establish that the denial of his rulemaking petition substantially prejudiced him.

## IX. CONCLUSION

Worthington requested the Board to repeal and redo years of rulemaking work to implement the legalization of marijuana. Because Worthington provided no clear basis to take this extraordinary step beyond legal conclusions and conspiracy theories, the Board appropriately denied the petition. Because this denial was not arbitrary or capricious and because Worthington did not meet his burden to show that the Board did not substantially comply with the APA's rulemaking procedures, this Court should affirm the Board's denial of that petition. Finally, this Court should decline to grant declaratory or injunctive relief under the UDJA and against non-agency defendants.

RESPECTFULLY SUBMITTED this 27th day of December,  
2016.

ROBERT W. FERGUSON  
Attorney General

A handwritten signature in black ink, appearing to read "R. July Simpson for 25, 159".

R. JULY SIMPSON, WSBA # 45869

APRIL S. BENSON, WSBA #40766

Assistant Attorneys General

Attorneys for Respondent

OID #91020

1125 Washington Street SE

PO Box 40110, Olympia, WA 98504

Phone: (360) 534-4850-Fax: (360) 664-0174

E-mails: RJulyS@atg.wa.gov

Aprilb1@atg.wa.gov

### PROOF OF SERVICE

I, Amy Phipps, certify that I caused a copy of this document—  
**Response Brief and Cross-Appellant's Opening Brief**—to be served on  
all parties or their counsel of record on the date below as follows:

☒ ***Sent USPS through Consolidated Mail Services to:***  
John Worthington  
4500 SE 2nd Place  
Renton, WA 98059

☒ ***Electronically Filed with:***  
Derek Byrne, Clerk/Administrator  
Court of Appeals Division II  
950 Broadway, Ste. 300  
Tacoma, WA 98402-4454

I certify under penalty of perjury under the laws of the state of  
Washington that the foregoing is true and correct.

DATED this 27th day of December, 2016, at Olympia,  
Washington.



---

AMY PHIPPS, Legal Assistant

# WASHINGTON STATE ATTORNEY GENERAL

**December 27, 2016 - 1:48 PM**

## Transmittal Letter

Document Uploaded: 1-490501-Respondents Cross-Appellants' Brief.pdf

Case Name: Worthington v. WSLCB, et al

Court of Appeals Case Number: 49050-1

**Is this a Personal Restraint Petition?** Yes ☐ No ☒

### The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

☒ Brief: Respondents Cross-Appellants'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Amy A Phipps - Email: [amyp4@atg.wa.gov](mailto:amyp4@atg.wa.gov)

### PROOF OF SERVICE

I, Amy Phipps, certify that I caused a copy of this document—  
**Response Brief and Cross-Appellant's Opening Brief**—to be served on  
all parties or their counsel of record on the date below as follows:

☒ ***Sent USPS through Consolidated Mail Services to:***  
John Worthington  
4500 SE 2nd Place  
Renton, WA 98059

☒ ***Electronically Filed with:***  
Derek Byrne, Clerk/Administrator  
Court of Appeals Division II  
950 Broadway, Ste. 300  
Tacoma, WA 98402-4454

I certify under penalty of perjury under the laws of the state of  
Washington that the foregoing is true and correct.

DATED this 27th day of December, 2016, at Olympia,  
Washington.



---

AMY PHIPPS, Legal Assistant